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EUROPEAN UNION

DELEGATION OF THE EUROPEAN COMMISSION

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1. The Delegation of the European Commission presents its compliments to the Department of State and has the honour to refer to the Notice of Proposed Rule-making (NPRM) FCC 97-142 adopted by the Federal Communications Commission (FCC) on June 4, 1997 in the matter of Rules and Policies on Foreign Participation in the U.S. Telecommunications Market.

2. The European Community and its Member States welcome the opportunity to comment offered by the FCC Notice and wish to express their appreciation that the FCC has respected its commitment to review the rules adopted in 1995 to govern the entry of foreign-affiliated carriers into the U.S. market for basic telecommunications services in the event of the negotiation of greater market access for U.S. carriers by the Executive Branch as a result of the WTO/GATS Agreement on Basic Telecommunications Services.

3. **The European Community and its Member States share the view of the FCC that the World Trade Organisation (WTO) Agreement on Basic Telecommunications Services reached on February 15, 1997 within the framework of the General Agreement on Trade in Services (GATS) is an historic achievement.** This Agreement, accounting for nearly 95 percent of the world basic telecommunications services' market, will further stimulate the development of telecommunications throughout the world, contributing greatly to the establishment of the Information Society on a global scale.

The importance that the European Community and its Member States attach to open telecommunications markets at a global level is clearly demonstrated by the scope of their commitments under the Agreement, as well as their active role during its negotiations.

4. **The European Community and its Member States share the ultimate aim of FCC in its NPRM 97-142, i.e. to ensure that consumers have access to lower prices and greater service choice and innovation**. We also share the main goals stated in paragraphs 25 to 27 of the NPRM, namely: i) to advance the public interest by promoting effective competition in the national telecommunications services market, particularly the market for international services; ii) to prevent anti-competitive conduct in the provision of international services or facilities; and iii) to encourage foreign governments to open their telecommunications markets.

However, the European Community and its Member States have serious concerns on the approach proposed in NPRM 97-142 to achieve those goals. The European Community and its Member States draw the attention to the fact that the WTO/GATS Agreement itself and its proper implementation are the best instrumants for achieving those goals.

5. The approach adopted by the FCC in NPRM 97-142 can be summarised by the following statement in paragraph 6: *"The fundamental market place changes that this agreement (the GATS/WTO Basic Telecom Agreement) will bring about allow us to lower this entry barrier while still promoting vital public interest objectives. We therefore will allow entry into the US international services market, as we do in the domestic interexchange market, subject to safeguards designed to ensure that no competitor with market power can act in an anti-*

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competitive manner. [...] we define market power as the possibility to act anti-competitively against unaffiliated US carriers through the control of bottleneck facilities on the route in question.". In addition, paragraph 9 states that: *"This regulatory approach is consistent with the approach taken in the domestic context pursuant to the Telecommunications Act of 1996, under which Bell Operating Companies (BOCs) and other local exchange carriers are permitted to enter the long distance market if they satisfy detailed statutory and regulatory safeguards designed to ensure that incumbent local exchange carriers are unable to leverage their power in the local market to the detriment of their interexchange competitors."*

The European Community and its Member States note that the FCC Notice attempts to characterise its re-examination of the Effective Competitive Opportunities (ECO) test and of its duty to safeguard the US public interest as motivated by the changes in the global market place resulting from the GATS/WTO Basic Telecommunications Agreement. However, the above references to domestic US regulatory standards and the approach in the Telecommunications Act of 1996 tend to indicate that the current re-examination primarily relies on the sole merit of US domestic rules rather than one compelled by its obligations under the GATS/WTO Agreement.

The European Community and its Member States note as a general remark that **the FCC fails in the Notice to bring evidence of the compatibility of its proposed rules with the multilateral trade system agreed by WTO Members.**

The European Community and its Member States consider that it is essential at this stage to avoid taking any action that may jeopardise the effective implementation of the commitments undertaken by the WTO Member countries under the Agreement. Major trading nations, and those which pursued most actively the successful conclusion of the negotiations, bear a special responsibility in this respect. **In this context, the European Community and its Member States have concerns with the potential negative impact that the rules proposed in that NPRM could have on the implementation of the commitments of the other WTO Member countries.**

6. **The European Community and its Member States support the FCC's proposal in NPRM 97-142 to eliminate the Effective Competitive Opportunities (ECO) test** regarding granting of licences under international Section 214[1], Section 310(b)(4)[2], and the Cable Landing License Act[3] by carriers from WTO Member countries, as well as the Equivalency test for Section 214 applications to provide switched, basic services over private lines between the United States and WTO Member countries, in light of the new competitive environment. **However, we have the three following major concerns** with the FCC's proposed approach:

i) the maintaining of broad and unclear *public interest* factors such as *law enforcement, foreign policy, or trade concerns* in determining whether to grant or deny applications under Section 214, Section 310(b)(4) and the Cable Landing Act (see paragraph 8 of these reply comments);

ii) the use of such a broad and unclear concept as a *"very high risk to competition"* as a justifications for refusing a licence (see paragraph 9 of these reply comments);

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[1] This would apply to provision of facilities-based, resold switched, and resold non-interconnected private line services.

[2] This would apply to common carrier radio licences.

[3] This would apply to cable landing licences.

iii) the assumption that significantly different safeguards are needed for U.S. carriers that are affiliated with foreign carriers that have market power in destination countries and for those affiliated with foreign carriers that do not face international facilities-based competition in the destination market could be incompatible with the GATS (see paragraph 11 of these reply comments);

The European Community and its Member States are concerned that, with the approach outlined in alineas i) to iii) above, the FCC would maintain the right to deny access to the U.S. market for applicants from WTO Member countries, on the grounds of **unclear and broad concepts** such as *"public interest factors" or "very high risk to competition"*. The European Community and its Member States consider that for the FCC to keep such discretion regarding access to the U.S. market would be against the aim and spirit of the GATS/WTO Basic Telecommunications Agreement. Furthermore, it would not provide the legal certainty and predictability required to allow foreign telecommunications industries to define their commercial strategies for access to the U.S. market.

7. The main argument used by the FCC in its Notice to keep such control over access to the U.S. market is the need to ensure that no **competitor with market power** can act in an anti-competitive manner.

In this context, the European Community and its Member States note the FCC's statement in paragraph 31 that the commitments under the GATS/WTO Basic Telecommunications Agreement *"represent significant progress towards achieving our goal of preventing anticompetitive conduct"*, and that *"as a result, most foreign carriers with monopoly positions today should have far less market power as a result of the WTO commitments, not only because they would be newly subject to competition but because they would be subject to meaningful disciplines to prevent abuse of market power in the form of interconnection obligations and other competitive safeguards to which their governments have committed. (...) The market access and regulatory commitments that their governments have made should provide a meaningful check on their exercise of market power."*.

We fully support the FCC's conclusion as stated in paragraph 39 that *"the WTO Basic Telecom Agreement sufficiently reduces the risk of anticompetitive effects, including anticompetitive conduct, that these post-entry safeguards will be adequate to protect competition in the U.S. telecommunications market."*

The European Community and its Member States believe that, apart from the regulations generally required for the functioning of the telecommunications market, such as allocation of scarce resources and interconnection, general competition law is the main instrument to ensure effective competition. The European Community and its Member States note the approach adopted in the European Community of a regulatory framework, which include competition rules, based on the GATS principles of reasonableness, objectivity, impartiality and transparency, all of which are fully in line with the Reference Paper, aimed at preventing *'major suppliers from engaging in or continuing anti-competitive practices'*. The European Community and its Member States note that their rules do not allow the denial of licences by an EC Member State to carriers which 'might' be a major carrier in another even if they engage in anti-competitive behaviour at a later stage.

We consider that such an approach creates the necessary conditions for open and fair access of foreign (including U.S.) companies to the European Community's markets, fully reflecting the aim and spirit of the GATS/WTO Basic Telecommunications Agreement.

Consequently, the EC and its Member States believe that it is most unlikely that an application would pose such a threat to competition in the US market for international services to warrant the ex-ante refusal of the licences.

8. As indicated above, the first major concern of the European Community and its Member States is the proposed maintaining of the ***public interest* factors** by the FCC in determining whether to grant or deny an application under Section 214, Section 310(b)(4) and the Cable Landing Act.

In particular, we are concerned about the statement by the FCC in paragraph 40 that *"it is unlikely that we would find in the public interest to grant the Section 214 application of a foreign carrier in circumstances where the carrier would have the ability, upon entry or shortly thereafter, to raise the price of US international service by restricting its output. In particular, a Section 214 applicant that is affiliated with multiple foreign carriers that control bottleneck facilities on the foreign end of major international traffic routes may be uniquely positioned to exclude competition in particular geographic and product markets"*. The European Community and its Member States are seriously concerned about the compatibility of this policy of refusal or revocation of licences on the basis of the affiliation of a carrier with foreign carriers which control essential facilities in third markets with the GATS Most Favoured Nation (MFN) principle.

Furthermore, the FCC states in paragraph 43 that *"other public interest factors may also justify denying an application for authorisation under Section 214 or Title III of the Communications Act. In particular, as we observed in the Foreign Carrier Entry Order, national security, law enforcement, foreign policy, or trade concerns brought to our attention by the Executive Branch may also require that we deny a particular application"*. Again, the European Community and its Member States have strong concerns with conditioning access to the U.S. market on such unclear and broad public interest concepts, such as *law enforcement, foreign policy, or trade concerns,* regarding the compatibility with the GATS/WTO principles of objectivity, non-discrimination and transparency, as well as the U.S. MFN and market access obligations. We believe that the US endorsement of the WTO Agreement on Basic Telecoms clearly indicates that WTO Members already satisfy the public interest objectives contained in the Notice, which thus cannot be applied to WTO Members.

9. The second major concern of the European Community and its Member States is the envisaged **establishment and the use that could be made of a *"rebuttable"* presumption in favour of granting applications regarding licences under international Section 214, Title III common carrier, and cable landing by carriers from WTO Member countries**, giving the possibility for a petitioner to show that granting a particular application would pose a *"very high risk to competition"* in the U.S. telecommunications market that could not be addressed by conditions that the FCC could impose on the authorisation. In particular, the fact that the rebuttal could be decided on the basis of very broad and vague criteria could conflict with the GATS disciplines.

Such an approach would erect additional burdens on foreign companies wishing to enter the U.S. market, which would be subject to challenges by their competitors based on unclear conditions and criteria. The European Community and its Member States have concerns about the

compatibility of such broad and vague competition policy objectives with the GATS/WTO Agreement, and require clarifications of the FCC (see also comments in paragraphs 15 and 16 of these reply comments) as to such compatibility.

We are also concerned that this approach would create further delays in the granting of a licence. In this particular respect, and without prejudice of the comments above, we consider that the FCC should set a time limit following the expiry of the comment period by which applicants should be informed whether an application is to be granted or refused.

Furthermore, we do not share the analysis of the FCC (in paragraph 41 of the NPRM) that the adjudicated violation of certain laws and regulations provides evidence of a *"a very high risk to competition"*. In particular, we object to the reference to anticompetitive or fraudulent conduct in a foreign market justifying the existence of such *"high risk"* and we consider this criteria being particularly targeted against foreign carriers.

10. In paragraph 82, the FCC identifies two circumstances where **carriers are to be considered as *dominant* in their provision of US international services** on particular routes: (1) where the FCC has determined that a US carrier can exercise market power on the US end of a particular route and (2) where the FCC has determined that a foreign carrier affiliate of the US carrier has market power on the foreign end of a particular route that can adversely affect competition in the US international service market (e.g. a carrier has the ability to act anticompetitively against unaffiliated US carriers through the control of services or facilities on the foreign end that are essential to terminate US international traffic). We also note in paragraph 87 that the FCC will no longer consider the effectiveness of regulation in the destination market as a relevant factor but instead will apply dominant carrier regulations to all foreign-affiliated carriers on routes where their affiliate has market power.

The GATS/WTO Reference Paper, where scheduled by WTO Members in their respective lists, allows these Members to impose obligations on carriers who are a major supplier to ensure effective access to their markets and to prevent competitive distortions. Such obligations may include inter alia competitive safeguards. The European Community and its Member States consider legitimate the classification of a carrier as dominant in order to impose further obligations as set out in the Reference Paper in the above-mentioned circumstance. However, the assumption that significantly different safeguards are needed for U.S. carriers that are affiliated with foreign carriers that have market power in destination countries and for those affiliated with foreign carriers that do not face international facilities-based competition in the destination market could be incompatible with the GATS. In the view of the European Community and its Member States, there should be reliance on the need for WTO Members on the "foreign end" to comply with their obligation to prevent anti-competitive practices on the basis of their additional commitments on competitive safeguards, if those exist, and on Articles VIII and IX of the GATS.

The Notice recognises in paragraph 83 that the dominant carrier safeguards may well affect the carrier's ability to respond more rapidly to competitive pressures to lower costs and prices and to improve the quality of services. We therefore strongly support the initiatives proposed by the FCC aimed at the removal of unnecessarily burdensome US regulations imposed on carriers which would otherwise adversely affect trade in telecommunications services.

11.In paragraph 104, the FCC Notice proposes " *to impose **supplemental dominant carrier regulation** on US carriers whose foreign affiliates have market power in destination countries and*

do not face facilities-based competition for international services in these destination countries." The Notice also specifies in this paragraph that: *"where a foreign carrier cannot make this showing, we would presume that sufficient competition does not exist to help protect against discrimination in favour of the foreign carrier's US affiliate and would impose supplemental dominant carrier regulation".* The European Community and its Member States have four sets of comments on this proposal:

a) this proposal, if implemented, would result in the over-regulation of dominant U.S. foreign-affiliated carriers. Indeed, carriers who for instance enjoy market power in the EU home market will already be subject to prescriptive obligations against anti-competitive practices notably through non-discriminatory and cost-based interconnection, irrespective of other additional safeguards. Such obligations will be imposed in accordance with regulatory principles of the Reference Paper. Given the positive outcome of WTO Negotiations on basic Telecommunications, which secures an open and competitive market world-wide, the European Community and its Member States therefore consider that GATS disciplines and the Reference Paper adequately address concerns expressed by the FCC in paragraphs 82-87 by preventing foreign carriers with market power from leveraging that market power in the U.S. market or any other market of a WTO Member;

b) on the procedure, the imposition of the burden of proof on the applicants seeking entry into the U.S. market in order to demonstrate that the country of the affiliated carrier has eliminated legal barriers to international facilities-based competition and has authorised multiple international facilities-based competition to compete with the incumbent carrier appears inconsistent with GATS disciplines.

c) thirdly, we are concerned about the fact that the imposition of supplemental safeguards on U.S. foreign affiliated carriers may impair or nullify the U.S.' obligations resulting from its list of specific commitments;

d)finally, we are concerned about the differentiation that the FCC establishes between basic safeguards and supplemental safeguards on the sole basis of whether the carrier is affiliated with foreign carriers which face competition on facilities-based services in the destination market. We understand therefore that, according to the FCC rules, two similar facilities-based foreign-affiliated carriers from different WTO Members could be treated differently on a same route for the provision of like services. This would be presumably incompatible with the GATS.

12. All the comments in the above paragraph also apply to procedures proposed in the Notice to justify the imposition on dominant carriers of other safeguards related **to structural separation,** - paragraphs 111-114 -, the **prohibition of exclusive arrangements between a US carrier and its foreign affiliate,** - paragraph 115-, and proposed measures to implement streamlined Section 214 procedures, - paragraphs 135 -137.

13. We also note in paragraph 109 that the FCC does not propose any changes to the **NPRM FCC 96-484 released on 19 December 1996 on the benchmarking of International Settlement Rates** and proposes the lifting of supplemental safeguards on any dominant foreign-affiliated carriers whose foreign affiliate offers settlement rates at or below the low end of the benchmark range as proposed in the NPRM 96-484. The European Community and its Member States request the Department of State to take note of the fact that the concerns expressed in the

Note Verbale of March 25, 1997, submitted by the European Communities and their Member states, remain valid in the present instance.

14. We note that the FCC Notice proposes in paragraphs 139-143 to require all international carriers including those established in WTO countries to **notify the FCC within 60 days prior to the acquisition of a 10 % or more of planned investment whether direct or indirect in the capital stock of an authorised carrier.** The European Community and its Member States understand that the FCC could deny approval of a planned investment as low as 10%, while a 25% investment or more would trigger the dominant safeguard provision. If this was the case, the European Community and its Member States consider that such a provision could result in a disguised market access barrier and thus constitute a violation of the U.S. WTO commitments on Basic Telecommunications services.

15. The European Community and its Member States welcome the FCC proposal in paragraph 150 to adjust its rules in the **Flexibility Order** 96-459 docket n° CC 90-337 as a result of the GATS/WTO Agreement since we constantly re-iterated in our previous Note Verbale that we do not consider the ECO test consistent with the MFN principle. However, we understand as set out in paragraph 150 that the ECO test would no longer be used to determine whether a U.S. carrier can enter into an alternative arrangement to the traditional accounting rate system, but instead the FCC Notice proposes to adopt a rebuttable presumption that flexibility is permitted for carriers from WTO countries. The European Community and its Member States note that the Notice indicates in paragraph 150 that: *"the presumption of flexibility may be rebutted by a showing that the country has not opened its market to competition either because the country has not complied with its market access commitments, its commitments have not been implemented or it made no commitment"*. We also note that the FCC Notice proposes later in paragraph 152 that the burden of proof would be on opposing parties to show that market conditions in a WTO country are not sufficient to prevent a carrier with market power from discriminating against a U.S. carrier. We consider legitimate the proposal to require a U.S. carrier seeking to enter into alternative arrangements to demonstrate that the other carrier is operating in a WTO country. However, only a WTO panel can ultimately determine whether the commitments scheduled by a WTO Member have been effectively implemented or not. Therefore, we consider that the proposed procedure set forth in the Notice is presumably inconsistent with the MFN treatment obligation.

16. The European Community and its Member States express their disappointment with the request of the FCC in paragraphs 47 and 122, for comments on *"whether the pro-competitive benefits of eliminating the ECO test for WTO Member countries (including WTO Member countries that have made no, poor, or unfulfilled commitments towards opening their markets to effective competition) outweigh the pro-competitive benefits of retaining the test for these countries"*, and on *"what measures we should take in the event we decline, or are unable, to implement any of the safeguards we have proposed (...) For example, should we reinstate the ECO and equivalency tests for WTO Member countries?"*

The European Community and its Member States consider that **any such retention of the ECO test would be clearly against the spirit of open market entry underlying the WTO Agreement and against the US commitments under such Agreement.**

We particularly support, in this context, the FCC's assessment in paragraph 34 that *"Eliminating the ECO test will ensure that foreign carriers will more easily be able to enter our market,*

providing price and service quality competition to U.S. carriers" and *"will also significantly reduce the time and regulatory burden associated with foreign market entry into the U.S. market in today's regime."*.

17. The European Community and its Member States note that the FCC proposes in paragraph 70 of the NPRM not to change its current "ad hoc"-"case-by-case" approach for the granting of licenses for **aeronautical communications services**. We believe that this retained case-by-case approach is not compatible with the U.S. commitments on mobile data communications services under the WTO Agreement on Basic Telecommunications Services. The latter prevent the retention of discretionary powers in the granting of licenses, and instead require the guarantee of legally binding market access rights.

18. On the basis of the above analysis, the European Community and its Member States **request the FCC to reconsider its proposal in NPRM 97-142 where necessary to ensure the full compatibility of the NPRM with GATS principles and obligations.**

19. The European Community and its Member States also reaffirm their request[4] to the FCC to amend its rules where necessary so that they do not conflict with GATS principles, including its NPRM in the matter of Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States (ECO-Sat test)[5].

20. **The European Community and its Member States reserve their rights to challenge under the WTO any rules to be proposed by the FCC which are not compatible with GATS obligations.**

21. The Delegation of the European Commission would be grateful for the views of the Department of State, and requests that this Note *Verbale* be transmitted to the Federal Communications Commission so that it can be part of the proceedings in this matter and put in the public record.

22. The Delegation of the European Commission avails itself of the opportunity to renew to the Department of State the assurance of its highest consideration.

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[4] Already expressed in their reply comments to the FCC NPRM 96-484 in the matter of International Settlement Rates

[5] NPRM FCC 96-210 adopted on May 9, 1996